No. 12,561

IN THE

United States Court of Appeals

For the Ninth Circuit

LIBBY, MCNEILL & LIBBY (a corporation),
Appellant,

vs.

ALASKA INDUSTRIAL BOARD, composed of the Territorial Insurance Commissioner, Attorney General of Alaska and the Territorial Commissioner of Labor, and JOHN LANDRO,
Appellees.

APPELLANT'S REPLY BRIEF.

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ARGUMENT.

COMPETENT EVIDENCE.

Appellant in its main brief (pp. 12 to 37) so thoroughly discussed the incompetency of the evidence upon which Landro relies (Appellees' Brief, pp. 2-5) as being competent evidence to support his claim, that appellant believes no necessity exists of again reiterating its argument on this point.

Appellant, however, does draw attention to appellees' own admission that the Board's findings must

be supported by competent evidence (Appellees' Brief, p. 4); but, nonetheless seemingly argues (Appellees' Brief, p. 5) that this evidence may consist of nothing more than Landro's appearance and demeanor upon the witness stand, when giving his evidence before the Board.

Appellant concedes that any forum may take into consideration the appearance and demeanor of a witness appearing before it in determining the weight and credibility to be given to that witness' testimony; but, appellant submits that, as so admitted by the appellees as hereinbefore stated, the findings of the Board must be based upon competent evidence, and the Board has no authority to make any finding except upon competent evidence regardless of what personal knowledge the Board may have of local conditions in Alaska.

Appellant contends that the reports and letters of Drs. Williams and LeCocq were not admissible in evidence for any purpose whatsoever (Appellant's Main Brief, pp. 15 to 25), and that the provision of the Act that "the Industrial Board may make rules not inconsistent with this act for carrying out the provisions hereof", Section 43-3-14 A.C.L.A. 1941 (Appendix "A", p. 29; Appellant's Main Brief, pp. 27-37) does not authorize the Board by rule or otherwise to base a finding upon other than competent evidence.

Appellant submits that the law nowhere authorizes the admission of incompetent evidence at a hearing upon a contested claim before the Board or the basing of a finding upon hearsay or *ex parte* evidence.

The Washington Supreme Court has specifically overruled its two decisions (Appellees' Brief, p. 9) in *Devlin v. Department of Labor,* 78 P. (2d) 952, and *McKinnie v. Department of Labor,* 37 P. (2d) 218, in its subsequent decision in—

Hutchings v. Department of Labor, 167 P. (2d) 444, 449, 450,

and by a long line of cases has sustained the principle for which appellant contends in this case, namely: that even in a workman's compensation case a finding of the Board must be based upon competent evidence.

In *Sweitzer v. Department of Labor,* 34 P. (2d) 350, that Court, upon rehearing, reversed its previous decision in 30 P. (2d) 980 and held that the report of a doctor who was not sworn as a witness was erroneously admitted in evidence; hence, that the decision of the Joint Board and the finding of the Superior Court were not entitled to a presumption of correctness.

That principle was sustained by that Court in—

Brown v. Department of Labor, 161 P. (2d) 533, 534.

That doctrine was again reaffirmed in *Hutchings v. Department of Labor,* supra, wherein as stated, not only were the previous *McKinnie* and *Devlin* cases overruled, but the Court also held that no part of the *ex parte* record, simply because the statute required it to be certified up to the Court, was admissible except subject to rules of evidence applicable to civil cases, and that a letter written by the alleged injured

employee to a physician was neither competent nor relevant.

The Washington Supreme Court has reaffirmed this rule in such late cases as—

Karlson v. Department of Labor, 173 P. (2d) 1001, 1012;

Olympia Brewing Co. v. Department of Labor, 208 P. (2d) 1181, 1185;

Lindsey v. Department of Labor, 213 P. (2d) 316, 317.

Appellant is not unmindful of the rule laid down by this Court in *Contractors et al. v. Pillsbury*, 150 F. (2d) 310, 312 (Appellees' Brief, p. 9); but, appellant submits that this Court neither in that nor any case has ever held other than that a finding must be based upon competent evidence.

Nor did the United States Supreme Court hold to the contrary in its two decisions cited by Mr. Circuit Judge Bone in the *Contractors* case. Mr. Justice Hughes specifically said: "We think there was evidence to support the finding of the Deputy Commissioner" in—

South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 261, 84 L. Ed. 732, 737, 738.

It is also clear that the United States Supreme Court holds that the inference leading to any finding must be based upon evidence.

See:

Norton v. Warner Co., 321 U.S. 565, 568, 88 L. Ed. 931, 935.

Appellant challenges appellees' contention (Appellees' Brief, p. 10) that hearsay or any other incompetent evidence is admissible for the purpose of being given such weight as the forum by whom a contested claim is heard may deem it entitled to, or that any such principle is supported by either

Lallier Construction Co. v. Industrial Commissioner, 17 P. (2d) 534,

or

Employers etc. v. Industrial A. C., 151 Pac. 423,

or by any other decision cited by appellant (Appellant's Main Brief, pp. 30 to 37) except in such cases and for such specific purposes as some state statutes authorize, which is not true of the Alaska statute (Appendix "A", pp. 1-52, Appellant's Main Brief).

RECOVERY OF ATTORNEYS' FEES ON APPEAL.

Appellant has discussed this question in its main brief (pp. 39 to 44) and believes no necessity exists to reiterate its argument other than to point out that the appellees (Appellees' Brief, pp. 10-11) clearly fail to give any heed to the fact that attorneys' fees allowable as costs under Section 55-11-55, A.C.L.A. 1949, are specifically limited to the classes of cases set out in Section 55-11-52, A.C.L.A. 1949 (Appellant's Main Brief, p. 43), whereas Workmen's compensation claims are not within any of those classes.

CONCLUSION.

Appellant again urges that the judgment of the District Court and the decision and award of the Alaska Industrial Board should be reversed and modified to holding that appellee Landro's total temporary disability ended on October 1, 1948, for which he was entitled to be paid total temporary compensation of $680.76 only, which was paid to him prior to his making and filing his claim herein (R. 39); and, that the decision of the District Court should be reversed in allowing appellee Landro an attorney fee of $200.00, or any sum, as an allowable cost for the services of his attorney in the proceedings on the appeal before the District Court.

Dated, October 9, 1950.

Respectfully submitted,

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Attorneys for Appellant.